Nos. 750, 782, and 783

FILED
APR 9 1966
JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners*

v.

FLORIDA EAST COAST RAILWAY COMPANY

UNITED STATES OF AMERICA, *Petitioner*

v.

FLORIDA EAST COAST RAILWAY COMPANY

FLORIDA EAST COAST RAILWAY COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF FLORIDA EAST COAST RAILWAY COMPANY

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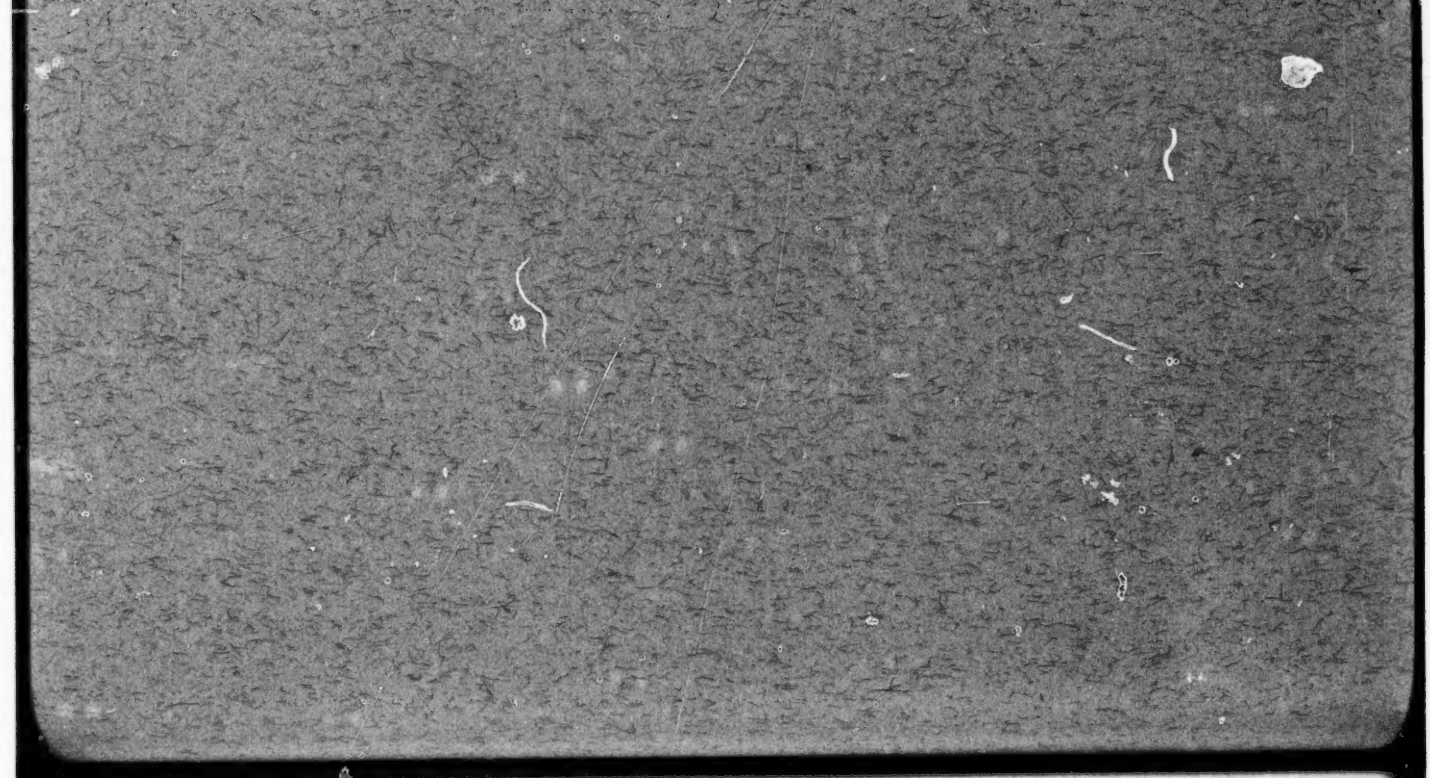

INDEX

	Page
Introduction	1
Argument	3
I. The Railway Labor Act Is Not Intended To Bolster or Restrict the Bargaining Position of One of the Parties to a Labor Dispute	3
II. The Literal Wording of the Statute, Consistent Industry Practice and the Holding of the National Railroad Adjustment Board All Are Contrary to the Position Advanced by the United States and the Unions	14
III. The Argument of the United States and the Unions Confuses F.E.C.'s Right of Self-Help During a Strike With Its Right To Make Permanent Changes in Agreement	29
IV. The United States Effectively Concedes That the Proper Forum for Adjudication of Suits To Enforce or Apply Collective Bargaining Agreements During Strikes Is Not the Federal Courts But the NRAB	35
V. Additional Errors of Fact and Law by the United States and the Unions Further Weaken Their Position	38
A. The Toledo case is misapplied by the unions	38
B. F.E.C. does not contend that the Railway Labor Act is "suspended" during a strike, nor does it seek to establish any "exception" to the Act	39
Conclusion	41
Appendix A	1a

TABLE OF CASES AND AUTHORITIES

Cases: Page

Airlines Pilots Ass'n v. *Southern Airways, Inc.*, 49 LRRM 3145 (M.D. Tenn., 1962) 33

American Ship Building Co. v. *NLRB*, 380 U.S. 300, 317 (1965) 9

Brotherhood of Locomotive Engineers, et al. v. *Baltimore & Ohio Railroad Co., et al.*, 372 U.S. 284 (1963) 8, f.4, 15, f.7, 34

Brotherhood of Locomotive Firemen and Enginemen v. *ICC*, 147 F. 2d 312 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 860 (1945) 11

Brotherhood of Maintenance of Way Employees and Missouri Pac. R. Co., Third Division, Award No. 5074 (1950) 26

Brotherhood of Maintenance of Way Employees v. *St. Louis Southwestern Ry. Co.*, NRAB, Third Division, Award No. 5042 (1950) 25

Brotherhood of Maintenance of Way Employees and Atlanta and West Point Railroad, NRAB, Third Division, Award No. 4170 (1946) 27, f.13

Brotherhood of Railroad Shop Crafts of America, Rock Island System, Grand Lodge No. 3 v. *Lowden*, 86 F. 2d 458 (10th Cir. 1936), *cert. denied*, 300 U.S. 659 (1937) 11

Brotherhood of Railroad Trainmen v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957) *reh'g denied*, 353 U.S. 948 (1957) 32

Brotherhood of Railroad Trainmen v. *Howard*, 343 U.S. 768 (1952) 28, 32

Brotherhood of Railroad Trainmen v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944) 38, 38, f.18, 39

Brotherhood of Railroad Trainmen and Kentucky and Indiana Terminal Railroad Company, NRAB, First Division, Award No. 17055 (1955) 24

Brotherhood of Railway and Steamship Clerks, et al. and Macon, Dublin & Savannah Railroad Company, National Railroad Adjustment Board, Third Division, Award No. 10,197 (1961) 24

Butte, Anaconda & P. Ry. Co. v. *Brotherhood of L. F. & E.*, 268 F. 2d 54 (9th Cir. 1959), *cert. denied*, 361 U.S. 864 (1959) 32

Page

Elgin, J. & E. Ry. Co. v. *Burley*, 325 U.S. 711 (1945), *opinion on rehearing*, 327 U.S. 661 (1946) 32
Estes v. *Union Terminal Co.*, 89 F. 2d 768 (5th Cir. 1936) 11
Flight Engineers v. *Eastern Air Lines*, 208 F. Supp. 182 (S.D.N.Y. 1962), *aff'd*, 307 F. 2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963) 32
Flight Engineers Int'l Ass'n v. *Western Air Lines*, 48 LRRM 2487 (S.D. Cal. 1961) 37, f.17
Florida East Coast Ry. Co. v. *Brotherhood of R. Trainmen*, 336 F. 2d 172 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965) 23, 30, f.14, 35, 39
In Re Missouri Pacific, 23 LRRM 2135, 2136 (E.D. Mo. 1948) 23
J. I. Case Co. v. *NLRB*, 321 U.S. 332 (1944) 32
Lumber & Sawmill Workers Union, 122 NLRB 1403, 43 LRRM 1324 (1959) *rev'd sub. nom., Great Northern Ry. Co.* v. *NLRB*, 272 F. 2d 741 (9th Cir. 1959) 23
Manning v. *American Airlines, Inc.*, 329 F. 2d 32 (2nd Cir. 1964), *cert. denied*, 379 U.S. 817 (1964) 32
Mission Mfg. Co., 128 NLRB 275, 46 LRRM 1289 (1960) 33
Missouri Pacific R.R. v. *Brick & Clay Worker Board 602*, 238 S.W. 2d 945 (Ark. Sup. Ct. 1951) 23
NLRB v. *Brown*, 380 U.S. 278, 283 (1965) 9
NLRB v. *Insurance Agents' International Union*, 361 U.S. 477, 488-90, 495, 498 (1960) 7, 9, 13
NLRB v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) 9, 33
NLRB v. *Southern Transport Inc.*, — F. 2d —, 61 LRRM 2257 (8th Cir. 1966) 30, f.14
Order of Ry. Conductors v. *Pitney*, 326 U.S. 561 (1946) *reh'g denied*, 327 U.S. 814 (1946) 32
Order of Railroad Telegraphers v. *Railway Express Agency*, 321 U.S. 342 (1944) 32
Pan American World Airways, Inc. v. *Flight Engineers International Ass'n, PAA Chapter*, 306 F. 2d 840 (1962) 32
Pullman Co. v. *Order of Ry. Conductors and Brakemen*, 316 F. 2d 556 (7th Cir. 1963), *cert. denied*, 375 U.S. 820 (1963) 32

Page

Railroad Yardmasters v. *Pennsylvania R. Co.*, 224 F. 2d 226 (3rd Cir. 1955) 32

Rutland Ry. Corp. v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (2nd Cir. 1962), *cert. denied*, *Brotherhood of Locomotive Engineers* v. *Rutland Railway Corp.*, 372 U.S. 954 (1963) 32

Ry. Employees' Co-op. Ass'n v. *Atlanta B. & C. R. Co.*, 22 F. Supp. 510 (D. Ga. 1938) 32

Stack v. *New York Cent. R. Co.*, 258 F. 2d 739 (2d Cir. 1958) 11

Steele v. *Louisville & N. R. Co.*, 323 U.S. 192 (1944) ..28, 32

United States v. *United Mineworkers of America*, 330 U.S. 258 (1947) 40, f.21

United Steelworkers of America v. *NLRB*, No. 89, October Term, 1963 23

Virginian Ry. Co. v. *System Federation No. 40*, 300 U.S. 515 (1937) 11

Western Air Lines v. *Flight Engineers Int'l Ass'n*, 194 F. Supp. 908, (S.D. Cal. 1961) 33, 37, f.17

STATUTES:

National Labor Relations Act

Railway Labor Act

Section 2, Seventh, 45 U.S.C. § 152, Seventh 17, 18, 29
Section 5, First, 45 U.S.C. § 155, First 16
Section 6, 45 U.S.C. § 156 .....18, 33, f.15
Section 10, 45 U.S.C. § 160 16
45 U.S.C. §§ 151a & 152 .....18, f.10
45 U.S.C. § 351 10

Hearings Before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess. 38 (1934) 18, f.10

H. R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926) ..18, f.10

H. R. Rep. No. 1944, 73d Cong., 2d Sess. 2 (1934) ..12, f.6, 17, f.9, 18, f.10

Railway Age, Volume 120, dated June 1, 1946 20

S. Rep. No. 222, 69th Cong., 1st Sess. 3 (1926) 18, f.10

Page

MISCELLANEOUS:

Annual Reports of the National Mediation Board, 1955-1964:

21st Annual Report (1954-55), pp. 5, 6 .....21, 22
22nd Annual Report (1955-56), p. 6 .....22, f.12
23rd Annual Report (1956-57), p. 4 .....22, 22, f.12
24th Annual Report (1957-58), pp. 8, 9 .....22, f.12
25th Annual Report (1958-59), pp. 8, 9, 10, 13 22, f.12
26th Annual Report (1959-60), pp. 8, 13, 14, 27 7, f.3, 13, 22, f.12
27th Annual Report (1960-61), pp. 10, 11, 14 22, 22, f.12
28th Annual Report (1961-62), p. 11 .....22, f.12
29th Annual Report (1962-63), pp. 1, 10 .....22, f.12
30th Annual Report (1963-64), p. 12 .....21, 22, f.12
31st Annual Report (1964-65) 22

Florida Times Union, Friday, April 1, 1966, p. 1, col. 1 20, f.11

General Counsel Adm. Rulings
SR 494, 46 LRRM 1253 (1960) 33
SR 1170, 47 LRRM 1601 (1961) 33

Miami Herald, Friday, April 1, 1966, p. 1, col. 1 ....20, f.11

Railway Age, Vol. 120, June 1, 1946, p. 1103 et seq. .. 20

Washington Evening Star, Friday, April 1, 1966, p. A-1, col. 2, cont'd p. A-4, col. 6 .....20, f.11

Washington Evening Star, Saturday, April 2, 1966, p. A-1, col. 8, cont'd p. A-14, col. 1 .....20, f.11

Washington Sunday Star, April 3, 1966, p. A-6, col. 4 20, f.11

APPENDIX A

Page

Letter dated September 28, 1962, from R. W. Wyckoff to E. C. Thompson, Executive Secretary, N.M.B. .. 1a

Letter dated October 19, 1962, from G. E. Leighty to E. C. Thompson, Executive Secretary, N.M.B. 2a

Letter dated October 22, 1962, from E. C. Thompson, Executive Secretary, N.M.B. to R. W. Wyckoff (F.E.C.) and G. E. Leighty (Chairman, Eleven Cooperating Labor Organizations) 4a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners*

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES OF AMERICA, *Petitioner*

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF FLORIDA EAST COAST RAILWAY COMPANY

INTRODUCTION

In the short time available, all of the factual misstatements and exaggerations in the briefs of those

opposed to the F.E.C. cannot be answered in detail. Some of the more flagrant of these we shall attempt hereinafter to correct.

The villainous caricature of the F.E.C. and its management which the United States and the Unions attempt to draw, quite apart from its untruthfulness, has nothing to do with the legal issues before the Court, for the decision here will define the rights of any rail or air carrier seeking to operate during a strike. The issue before this Court is whether a rail or air carrier may try to operate in the face of a strike. It is the Railway's position that in the performance of its duty as a common carrier to render service, once the strike began it was entitled to resort to self-help—to operate with any work force available.

The argument that the statute requires F.E.C. to comply with every provision of every agreement during a strike as a prerequisite to operating rests upon a misreading of the statute, allegedly supported by an assumed industry practice, *viz,* that rail carriers have rarely tried to operate during a strike and, accordingly, that the language of the Act was intended to reflect this practice by making it impossible for a carrier to operate at all when struck unless able to comply completely with its collective bargaining agreements. The Unions make no such claim as to the industry practice; in fact they conceded that F.E.C. was entitled to try to operate and that their agreements did not require the maintenance of contract structure when there were insufficient employees to do so. Actual industry practice is and has always been diametrically opposed to the United States' assumption.

The United States and the Unions contend further that the Act is intended to preclude carriers from using self-help to defeat a strike and that, except as to particular amendments to agreements which have cleared the mediation process, a carrier is bound to adhere inflexibly to all other provisions of the agreements even though the strike has changed working conditions completely. The contentions of the United States and the Unions are erroneous and flatly at odds with the purposes of the Railway Labor Act.

The United States goes far toward conceding the proposition advanced by F.E.C. that if the agreements are not suspended during a strike the National Railroad Adjustment Board has exclusive jurisdiction to apply and enforce them. The United States apparently does not recognize the implications of this concession; to wit, that the District Court was without jurisdiction to enjoin alleged violations of collective bargaining agreements or to require the Railway to apply for approval of "reasonably necessary" employment practices.

ARGUMENT

I. THE RAILWAY LABOR ACT IS NOT INTENDED TO BOLSTER OR RESTRICT THE BARGAINING POSITION OF ONE OF THE PARTIES TO A LABOR DISPUTE.

Candidly (albeit erroneously) the Unions' brief (U. br.) sets forth the claim that the Railway Labor Act was intended to make it difficult if not impossible for a carrier to defeat a strike by continuing to operate (U. br. pp. 41-44). This is a fundamental premise of their position. They complain that the "carrier's 'right of operation' . . . [will] render ineffectual the workers' 'cherished right to strike'" (U. br. p. 43). "For, if the carrier has a federally protected right 'to

run * * * under strike conditions', then the whole idea of striking is rendered sterile" (U. Br. p. 44).[1] They ask, therefore, for a decision that in effect guarantees the success of a strike by restricting the F.E.C.'s efforts to restore operations to strict compliance with agreements, every provision of which was ignored by both the strikers and by those who refused to cross picket lines.

The same contention is fundamental to the United States' position. Thus, in its brief (U.S. br.) it argues that the F.E.C. took advantage of the strike over a wage dispute "to make immediate sweeping changes in its work-rules to permit operation on favorable terms" (U.S. br. p. 29). It argues in this vein at length (U.S. br. pp. 25-33) referring repeatedly to the fact that in the years following the first year of the strike when it operated at a loss, F.E.C. was able to earn a profit (U.S. br. pp. 8, 9 n. 9, 29, 30, 36).

Seeking to bolster the argument that a carrier (as distinguished from other employers) should not be allowed the full use of economic weapons to overcome a strike, the United States and the Unions contend that F.E.C. could have operated at 50% of its capacity, arguing that at that level of operations F.E.C. would be more amenable to settling the strike. The record references as to F.E.C.'s claimed ability to operate at 50% capacity under the agreements are to testimony given on May 26, 1964, *more than sixteen months after*

[1] Just where this "federally protected right" originates is not made clear. F.E.C. claims no federal protection in this case where the strike is concededly legal; it claims only the right to meet the strike without being handcuffed by an erroneous interpretation of the Railway Labor Act. Moreover, F.E.C. has not claimed, nor did the Court below grant, any "right to operate". F.E.C. claims only a "right to *attempt to* operate" as one of its economic weapons, and that the Railway Labor Act does not deprive it of that right.

the strike began. The testimony relates only to the level at which F.E.C. could have operated on May 26, 1964, with the work force it had been able to recruit by then, and to the reduction in operations which would then have resulted if it were forced to comply in all respects with the agreements (R. 353-54). *There is no question, however, that at the time the strike began and for a substantial period thereafter, F.E.C. could not have run a single train in compliance with the agreements* (R. 353, 359, Ex. R. 219-20) *and indeed could never have resumed service without using supervisory employees* (R. 204-08, 211-13, 359, 382, 384, 390, 394-95). Neither the United States nor the Unions has had the temerity to suggest the contrary, *notwithstanding that use of supervisors to operate is not provided for in the agreements.*

After the bombings of the F.E.C.'s property ceased, F.E.C. resumed passenger service. This is conceded by the Unions (U. br. p. 13, n. 10), but in the United States' brief the false impression is conveyed that F.E.C. still has not resumed passenger service (U.S. br. pp. 9-10 n. 9, 29). It is also stated that F.E.C. refuses to carry less-than-carload freight, but this is untrue as counsel for both the United States and the Unions well know (R. 758, 759-60, 769-71). There is no record support for the charge of laxity in F.E.C.'s hiring and training program.

The case of F.E.C.'s opponents rests heavily upon the supposed terrible consequences of allowing a carrier to employ self-help when faced with a strike. Again and again they contend that even the "reasonably necessary" rule enunciated by the Court below will lead inevitably to situations in which a carrier might not wish to settle a strike. They hypothesize that if a carrier has the right of self-help, and if it succeeds in

operating in spite of the strike, it may establish conditions most favorable to itself and broaden the areas of dispute.

This is pure fantasy. If at any time the unions feel that a carrier is having too much success in resisting a strike, they can, at their own choosing, terminate the right to resort to self-help by ending their strike.

The most that can be said for the assertions of the United States and the Unions is that a carrier forced to resort to self-help during a strike may find more efficient ways to operate. Every employer, whether a carrier or not, who has ever operated under a strike has had this experience. It is true that F.E.C. found innumerable ways it could operate more efficiently, including better equipment, automation, etc., as a result of being forced to innovate in order to operate during a strike. The F.E.C. served Section 6 notices proposing changes in agreements to reflect these efficiencies, as any carrier is legally entitled to do.[2]

It is further contended that the "voluntary settlement of disputes" provisions of the Act will be "undermined" if a carrier has the right to attempt to operate during a strike without regard to collective bargaining agreements. For, the agrument runs, the carrier will not accept a reasonable pre-strike settlement of a dispute if it knows it can institute whatever operating practices it desires once a strike is initiated. Aside

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[2] The Railway's service of Section 6 notices concerning the "Uniform Working Agreement" and the "Union Shop Agreement" and the controversy concerning its attempt to implement these notices because of the Unions' refusal to negotiate are not before this Court. The attempt by F.E.C.'s opponents to revive this controversy and make it significant in this case is dealt with *infra*, Point III.

from the fact that it assumes lack of good faith on the part of carriers in general (which has nowhere been shown to exist) this argument entirely misses the point. Any statute which, like the Railway Labor Act and the NLRA, contemplates an ultimate resort by the parties to labor disputes to their economic weapons, implicitly recognizes that the party in the strongest economic position will be least inclined to give way to the other's demands.

This is not a novel or a frightening thought—it is part and parcel of our collective bargaining system in which, as this Court said in *NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477 (1960), "[the] necessity for good-faith bargaining" and "the availability of economic pressure devices . . . exist side by side . . . ." (361 U.S. at 489). The National Mediation Board has said in this regard:

> "As with any system or plan which seeks to retain freedom of contract and the right to resort to economic force, there have been periods of crises under the act, but in the aggregate, the system has worked well—it has settled large numbers of disputes both at the local and national level with a minimum of disturbance to the public."[3]

By use of hindsight and a "conspiracy theory" of the history of the instant dispute, F.E.C.'s opponents credit F.E.C. with an almost supernatural prescience, as if the Railway had encouraged the Unions to strike in order to be able to make temporary changes in operations. Nothing could be further from the truth. When the Unions struck, of course they believed they could force the Railway to cease opera-

[3] 26th Annual Report of the NMB (1959-60), p. 8.

tions—not by compelling adherence to existing collective bargaining agreements (for this theory was not advanced by them until long after the strike began), but merely by depriving F.E.C. of its entire work force. Initially their expectations were borne out because F.E.C. was completely closed down; ultimately they were disappointed, and so, more than a year after the strike began, they concocted their legal theories in an attempt to rectify their error. Clearly, however, the F.E.C. did not "foment" the instant strike. Moreover, the United States' assumption that other railroads will be encouraged to "foment" strikes in order to employ self-help is totally unsupported either by the record, by common sense, or by the facts of railroad industry experience. No employer "knows" in advance that he can operate during a strike; only a fool would deliberately foment one. The United States and the Unions fail utterly to demonstrate that across the nation carriers' resort to self-help would successfully defeat strikes, because no such showing is possible.

It is necessary to point out that even if the dire predictions of the United States were correct—i.e., that the balance of economic power lies with the carriers, which may be able to defeat strikes by resorting to self-help[4]—the remedy is not to reinterpret the Act

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[4] That this prediction is utterly baseless is, we submit, amply demonstrated by the fact that no one has ever before remotely suggested that there is any balance of economic power in favor of carriers. Once the procedures of the Act are exhausted, as this Court said in the *B&O* case, 372 U.S. 284 (1963), both parties are relegated to self-help. This means that the offices and compulsion of the government are no longer at work to resolve the dispute. Each party is legally in an equal position; the one with the stronger economic power will prevail.

so as to eliminate employer self-help. If the United States and the Unions are correct (which we deny) in stating that the unions' right to strike will be rendered a *practical* nullity by the carriers' economic power expressed through self-help, Congress, not this Court, must redress the balance.

The use and counter use of the economic weapons available to each party is the very essence of collective bargaining. And it is collective bargaining and its protection which is the cornerstone of the national labor policy. *NLRB* v. *Insurance Agents' International Union, supra,* 361 U.S. at 488-90, 495, 498; *NLRB* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938); *NLRB* v. *Brown,* 380 U.S. 278, 283-84 (1965); *American Ship Building Co.* v. *NLRB,* 380 U.S. 300, 317-18 (1965)—

> "In this case the Board has, in essence, denied the use of the bargaining lockout to the employer because of its conviction that use of this device would give the employer 'too much power.' . . .
>
> " '[W]hen the Board moves in this area * * * it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. It has sought to introduce some standard of properly "balanced" bargaining power . . . .'
>
> ". . . Indeed, the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act . . . ."

In this case the Unions, because their strike has not brought F.E.C. to its knees, and the United States, for reasons which are not readily apparent, seek to find in the Railway Labor Act an intention to protect

the labor organizations from the consequences of improvident strikes by prohibiting the use of self-help.

The argument in essence is that the carrier must suffer as a result of a strike in order that the strike can be settled. Thus it is contended that collective bargaining agreements must be complied with by the carrier during a strike because:

> "With both parties suffering from the dispute in direct proportion to its duration, some middle ground for compromise and settlement before too long would almost always be found." (U. br. p. 46)[5]

Similarly, the United States' stated "principal concern" is for the "future impact upon railway labor relationships" of a carrier having the right to operate after a strike commences. The United States worries that "by obtaining the ability, through abrogation of existing agreements, to run profitably despite the strike" (U.S. br. pp. 35-37), the carrier will not be inclined to settle the underlying dispute. The real position of the United States and the Unions is that this Court should engraft upon the Railway Labor Act a

---

[5] Nowhere in the Union briefs is there any recognition of a unique provision of federal law which protects striking railroad employees by providing them with tax-free unemployment benefits which are paid from funds collected from the carriers. 45 U.S.C. § 351, *et seq.* The Railroad Retirement Board has reported that through May 31, 1965 $6,694,000 had been paid to strikers and non-strikers on the F.E.C. (only $1,848,000 having been paid to non-strikers). In no other industry are striking employees accorded such protection. Yet the Unions would have this Court hold that railroad carriers (and air carriers), unlike all other employers, must not be permitted to resort to self-help during a strike because otherwise, they assert, the balance of economic power might favor the carriers.

policy that the unions will prevail any time they strike.

Not a word in the statute or its legislative history suggests an intention to require that a strike be successful. Nowhere in any provision of the Act or any court decision interpreting it can there be found a hint of a policy which provides for or contemplates compulsory settlement of disputes or control of the outcome of a strike once it has commenced. Plainly, the purpose of the Act was to avoid strikes if possible by providing for mandatory bargaining, mediation, cooling off and the application of public opinion via the recommendations of an emergency board. Beyond this it did not go.

There has been no reference to any statutory provision or any legislative history supporting the theory which the United States and the Unions have advanced. In fact there is none. A major objective of the Railway Labor Act was the avoidance of strikes and their consequent harmful effects on the public interest in the continuity of rail transportation by requiring conferences and mediation and the maintenance of the status quo while such conferences and mediation were pursued. See *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515 (1937); *Estes* v. *Union Terminal Co.,* 89 F. 2d 768, 770 (5th Cir. 1937); *Brotherhood of Railroad Shop Crafts of America, Rock Island System, Grand Lodge No. 3* v. *Lowden,* 86 F. 2d 458 (10th Cir. 1936), *cert. denied,* 300 U.S. 659 (1937); *Brotherhood of Locomotive Firemen and Enginemen* v. *ICC,* 147 F. 2d 312 (D.C. Cir. 1945), *cert. denied,* 325 U.S. 860 (1945); *Stack* v. *New York Cent. R. Co.,* 258 F. 2d 739 (2d Cir. 1958). The contentions that the Act was also intended to maintain

the status quo once a strike commenced and to require the carrier to bargain with striking unions over practices required to combat a strike are frivolous unless the Act also outlaws strikes.[6] Having provided in four places in the statute for the preservation of the status quo prior to a strike, Congress certainly would have provided expressly for the preservation of the status quo during a strike had it intended to do so; but, there is no such provision.

F.E.C. is not contending for an "exception" to the Railway Labor Act as is repeatedly alleged in its opponents' briefs. Indeed, we submit, the Court below did not create any exception to the Act. F.E.C. is not contending either that it has a "federally protected" right of self-help. The right of self-help simply is not

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[6] The 1934 amendment to the Act containing Section 2, Seventh, which the United States and the Unions imply was meant to alter radically the *Act's* mediation and conciliatory procedures designed to *avoid strikes*, was clearly not intended to limit the right of self-help once a strike occurred. No change in the law was intended in the 1934 Act as the legislative history makes clear. As to Section 2, it was explained that:

> "The bill does not introduce any new principles into the existing Railway Labor Act, but it is designed to amend that act in order to correct the defects which have become evident as a result of 8 years of experience. It does not change the methods of conference, mediation, and voluntary arbitration to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926, now in effect." (H. R. Rep. No. 1944, 73d Cong., 2d Sess. 2 (1934)).

In all its provisions and in its legislative history as a whole, the plain intention of the Act was *to avoid* strikes. The word strike never appears in the statute and there is not one provision of the Act which has any meaningful reference to what is required in respect to operations once the Act's procedures have failed to avert a strike.

taken away by the statute. What F.E.C. does contend is that once the labor organizations elect to use economic force against a carrier, the carrier is entitled to utilize fully the economic weapons at its disposal. Neither party to the dispute is inhibited in the legitimate use of its respective economic power. No special economic power is granted by the Act to the striking labor organization. Having unleashed economic warfare by refusing to work, the members of the labor organizations risk the possibility that the carrier can replace them and continue in operation; and, nothing in the Act reduces that risk. There is no policy governing the substantive terms upon which a dispute which had gone to strike should be settled.

Use of economic pressures is clearly "part and parcel of the process of collective bargaining" (*NLRB* v. *Insurance Agents' International Union, supra,* 361 U.S. at 495). *Unless Congress has specifically outlawed the use of a particular economic weapon, this Court has stated the use of that weapon is lawful in the hands of an employer* (361 U.S. at 498-99). See also *NLRB* v. *Brown, supra.* By the Railway Labor Act, Congress did not intend to balance the scales of collective bargaining more heavily in favor of one of the parties than the other. As the National Mediation Board has stated:

> "When the Board finds it impossible to bring about a settlement of any case by mediation it endeavors as required by section 5, first, of the act 'to induce the parties to submit their controversy to arbitration'. . . . Arbitration must be mutually desired and there is no compulsion on either party to agree to arbitrate. The alternative to arbitration is a test of economic strength between the parties." (26th Annual Report of the NMB (1959-60), p. 27)

The decision of the courts below which would restrict F.E.C.'s use of self-help and the positions of the United States and the Unions which would eliminate the right entirely by preventing or hampering the efforts of a carrier to get back into operation during a strike should be rejected by this Court.

II. THE LITERAL WORDING OF THE STATUTE, CONSISTENT INDUSTRY PRACTICE AND THE HOLDINGS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD ALL ARE CONTRARY TO THE POSITION ADVANCED BY THE UNITED STATES AND THE UNIONS.

Clearly, there is no intention manifested in the Railway Labor Act to give unions a free hand in their use of economic weapons while tying the carriers' hands; nor, is the carriers' right of self-help (which, sans the statute, clearly exists) in any way expressly limited or taken away. Indeed this Court has held that once the Act's procedures are exhausted, the mutual use of self-help is all that is available to resolve disputes between labor and management. And, as the National Mediation Board itself has stated, after the Act's procedures have been exhausted, "the alternative to arbitration is *a test of economic strength.*"

It is contended, however, that under the Railway Labor Act, self-help is not available to a struck carrier because the alleged "literal" language of the statute precludes it from meeting strike-caused conditions except by complying strictly with collective bargaining agreements. Only in respect to matters in dispute which have gone through the statutory mediation process is the carrier free to alter its normal practices and then, the argument goes, it may only alter conditions within the limits of its prior Section 6 proposals.

It is not strange that the United States has failed thus far ever to cite or mention this Court's decision

in the *B&O* case.[7] Obviously, the holding there that the right of "self-help" is available to a carrier and the generally accepted meaning of this right completely negate the interpretation of the Act which is urged.

The United States and the Unions would have the Court believe that the only steps which F.E.C. could take in self-help were to pay the rates of pay to the non-ops and to give the notice of abolition of jobs contained in F.E.C.'s Section 6 notices given prior to the strike of January 23, 1962. Of course, they do not advert in making this argument to the fact that there were no scope (non-supervisory) employees to pay at the time of the strike. Even after resumption of operations, the vigorous hiring program initiated by the Railway did not succeed in attracting sufficient skilled personnel to make compliance with agreements possible (R. 661-62, 666-67, 672-74, 685-87, 702, 712-14, 723-24, 744, 753, 761-64, 775-86). The plain fact is that all of the unions and their members had, by going on strike and honoring picket lines, created working conditions 100% different from those embodied in, and contemplated by, the agreements. If, in fact, what F.E.C. did to meet the strike was a "change" in "the rates of pay . . . etc. . . . of its employees, as a class, *as embodied in agreements*"[8] within the meaning of Section 2, Seventh, of the Act, then the strike was also a change in the status quo unilaterally made by the Unions and their members, and must under the theory espoused have also been unlawful. Or, as stated in

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[7] *Brotherhood of Locomotive Engineers, et al.* v. *Baltimore & Ohio Railroad Co., et al.*, 372 U.S. 284 (1963). The unions mention the case casually (U. br. pp. 41-42), (R.L.E.A. br. pp. 7-8).

[8] Emphasis is supplied throughout unless otherwise indicated.

our initial brief (p. 23) the conditions set forth in agreements were changed by the Unions when they struck. Under no interpretation can it be said that the Railway changed conditions—it merely reacted to strike-changed conditions.

The United States and the Unions, in purporting to follow the "literal" language of Sections 2, Seventh and 6 of the Act, appear to maintain that the language, which in some instances refers to carriers without mentioning the unions, restricts carriers in the use of self-help without limiting the right to strike. This is nonsense. Until the Act's procedures have been exhausted, the status quo provisions of the Act apply equally to both parties. Thus, Section 5, First of the Act (45 U.S.C. § 155, First) states:

> "If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for 30 days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Similarly, Section 10 (45 U.S.C. § 160), providing for the creation of Presidential emergency boards, states that:

> "After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

Clearly, after expiration of the cooling-off periods provided by Section 5, First and Section 10 of the Act,

both parties are equally free to resort to self-help. There is a clear parallel between the right to strike and the carrier's right to self-help, neither of which is mentioned in the Act. Both exist side-by-side. The Act simply does not require the maintenance of any status quo during a strike.

The legislative history of the 1934 amendments to the Railway Labor Act makes it clear that the language in Section 2, Seventh of the Act, was used for a particular reason. The purpose of Section 2 of the Act, as amended in 1934, was "to provide for the complete independence of carriers and of employees in regard to self-organization" and "to prohibit any interference with freedom of association among employees . . . ."[9] One of the ways in which a carrier may hinder the right of employees to organize and to choose representatives freely is to attempt, while bargaining and mediation are still in process, to make permanent changes in rates of pay, rules or working conditions as embodied in agreements without consultation or negotiation with the duly selected representative of the employees. This form of undercutting of the authority of the duly designated employee representatives was what Section 2, Seventh was intended to outlaw. There is not the slightest evidence that the intention of Section 2, Seventh was to inhibit the carrier's ability to respond to strikes by making adjustments to strike conditions after exhaustion of the Act's procedures.

What Section 2, Seventh (45 U.S.C. § 152, Seventh) says is that a carrier cannot *change the provisions of agreements* relating to working conditions, rules or rates of pay without first exhausting the Act's proce-

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[9] H.R. Rep. No. 1944, 73d Cong., 2d Sess. 1-2 (1934).

dures. This is borne out by Section 6 which again specifically prohibits only "an intended *change in agreements* affecting rates of pay", etc. (45 U.S.C. § 156). Neither section refers to strike-induced temporary practices which do not involve a "change in agreements". The contention of the Unions and the United States and the decision of the courts below misapply the statutory language insofar as temporary practices designed to meet a strike are concerned. Sections 2, Seventh and 6 both refer expressly and only to changes in agreements and to nothing else. Moreover, the opposition completely overlooks the over-all scheme of the statute which is to preserve the status quo *prior* to a strike being called so as to foster the basic purpose of avoiding interruption to interstate commerce arising from strikes.[10]

Recognizing, as it must, the absurd results to which their argument would lead, especially in the case of a massive strike, the United States seeks to justify its interpretation of the statute by a claim that the railroad industry practice is to refuse to attempt to operate during a strike. For some inexplicable reason the United States concedes that the airlines (subject to the same Act) do try to operate.

For the first time in this litigation, the claim was made in the United States' petition for certiorari (pp. 14-15, "that FEC is the only railroad carrier to attempt to operate during a strike in the last five years." In its initial brief to this Court, commenting on the

[10] See 45 U.S.C. §§ 151a, 152; S. Rep. No. 222, 69th Cong., 1st Sess. 3 (1926); H. R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926); H. R. Rep. No. 1944, 73d Cong., 2d Sess. 2 (1934); Hearings Before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess. 38 (1934). See also cases cited at p. 11, *supra*.

"'reasonably necessary'" rule of strike operation fashioned by the Court below and upon F.E.C.'s position, the United States says:

> ". . . Such a rule should, in these circumstances, not be established *unless it has clear historical roots within the railway industry as an implicit gloss upon the otherwise unqualified statutory language.* We now show that such an understanding has never existed. . . ." (U.S. br. p. 38)

Repeatedly in support of various phases of its argument, the United States adverts to the supposed industry practice of not operating during a strike. Thus:

> "In the railway industry, it has been highly unusual for a struck carrier to attempt to operate." (U.S. br. p. 41; see also U.S. br. pp. 47-48)

We take it as virtually conceded that if the practice is contrary to that described by the United States, the interpretation of the Act urged by them, and adopted in large part by the Court below, must be erroneous.

The United States' concept of the industry practice is totally at variance with the facts. The brief of the Association of American Railroads refers to numerous examples of operations by carriers during strikes and quotes the uncontradicted testimony relating to this accepted practice given during the proceedings of the Presidential Railroad Commission (A.A.R. br. pp. 19-22). The A.A.R. states its concern as amicus curiae as follows:

> *"The Court of Appeals has construed and applied the Act so as to overturn a practice followed by the railroads for generations and never questioned before"* (A.A.R. br. p. 2),

and the A.A.R. is fully qualified to state what the practice actually is.

The implications of the position of the United States, as well as the decision of the courts below, if the situation which faced F.E.C. were nationwide in scope are far reaching. That situation actually existed in 1946. Following exhaustion of the procedures of the Railway Labor Act, the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen went out on strike, causing a nationwide interruption to railroad commerce.

In "Railway Age," Volume 120, June 1, 1946, page 1103, there appears an article entitled "Many Trains Were Run Despite The Strike", which commences as follows:

> "The determination of railroad managements to meet their obligations to serve the public despite the difficulties created by the strike on May 23 of employees belonging to the trainmen's and engineers' brotherhoods is reflected in the following road-by-road report of operations during the period the strike was effective. . . ."

Railway after railway is shown to have maintained some operations using "supervisory employees", "officers" and "volunteers". Indeed the F.E.C. as it had during every prior strike operated using supervisors. Similarly, as this brief was being written many of the railroads subjected to the March 31, 1966 strike by the Brotherhood of Locomotive Firemen and Enginemen were in partial operation using supervisors according to press accounts.[11] Yet, according to the

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[11] See e.g., the Washington Evening Star, Friday, April 1, 1966, p. A-1, col. 2, cont'd p. A-4, col. 6; Washington Evening Star, Saturday, April 2, 1966, p. A-1, col. 8, cont'd p. A-14, col. 1; Washington Sunday Star, April 3, 1966, p. A-6, col. 4; Miami Herald, Friday, April 1, 1966, p. 1, col. 1; Florida Times Union, Friday, April 1, 1966, p. 1, col. 1.

United States and the Unions, use of supervisory employees to operate a train is *per se* a violation of agreements and of the Act.

The sole reference by which the United States attempts to support its assertion is to the reports of the National Mediation Board, which contradict rather than support its claim. These reports, which most often do not mention whether or not a carrier has operated during a strike, reveal nevertheless the extent to which carriers under the Railway Labor Act do operate, strike or no strike. The recent examples of operations during strikes cited by the A.A.R. (A.A.R. br. p. 19, *et seq.*) disprove the assertion and the Reports of the National Mediation Board likewise disprove the claim. Time and again language of the following character is found in the Reports:

30th Annual Report of the NMB (1963-64), p. 12:

"... One of these strikes involves the Flight Engineers' International Association and Eastern Airlines, Inc., which began on June 23, 1962. Regular flight operations, however, were resumed by the carrier in September 1962. The other strike involves Florida East Coast Railway Company. The Eleven Cooperating Railway Labor Organizations, representing non-operating employees, withdrew from the service of the carrier on January 23, 1963. However, the carrier resumed operations on or about October 1, 1963, on a limited basis and has continued to operate."

21st Annual Report of the NMB (1954-55), p. 5:

"The most serious and prolonged strike occurring during the fiscal year involved a group of carriers, generally referred to as the 'Louisville & Nashville Railroad System'."

p. 6:

> "Efforts by these carriers to continue operation of their lines resulted in a few minor work stoppages at connecting points with other railroads."

23d Annual Report of the NMB (1956-57), p. 4:

> "A strike of 22 days' duration occurred on this carrier [Denver Union Terminal Railway Company] . . . . Except at the very beginning this carrier operated almost on a normal basis all through the strike."

In fiscal year 1961 there were 18 railroad strikes involving 27,800 employees lasting in the aggregate 236 days. As to strikes during this period the NMB stated that they:

> ". . . did not seriously interrupt interstate commerce. In several instances carriers continued operations during the strike period."[12]

We note that although the F.E.C. strike and its resumption of operations is referred to a number of times in the NMB Reports, nothing in the reports would signify anything unusual or unlawful about F.E.C.'s actions. In fact the 31st Annual Report of the NMB (1964-65) does not even mention the F.E.C. strike. The language elsewhere used to report F.E.C.'s resumption of operations is precisely the same language utilized in describing the return or maintenance of operation by the other carriers referred to.

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[12]27th Annual Report of the NMB (1960-61), p. 10. See also: 22d Annual Report of the NMB (1955-56), p. 6; 23d Annual Report of the NMB (1956-57), p. 4; 24th Annual Report of the NMB (1957-58), pp. 8, 9; 25th Annual Report of the NMB (1958-59), pp. 8, 9, 10, 13; 26th Annual Report of the NMB (1959-60), pp. 13, 14; 27th Annual Report of the NMB (1960-61), pp. 10, 11, 14; 28th Annual Report of the NMB (1961-62), p. 11; 29th Annual Report of the NMB (1962-63), pp. 1, 10; 30th Annual Report of the NMB (1963-64), p. 12.

That the practice of rail and air carriers to try to operate during a strike has always been recognized without question is emphasized by the facts that: (a) in both the *Trainmen* case (as noted in that opinion) and in this instant case the Unions conceded that supervisory personnel could be used to operate and that contract structure need not be maintained when sufficient crews were not available; and (b) the United States did not file the instant suit until more than sixteen months after the strike began. If F.E.C.'s actions were so unusual and unlawful, surely the Unions' concessions would not have been made and someone would have moved sooner to prevent such actions.

The truth of the matter is that the consistent practice of carriers to meet strike situations by using supervisors or officers has never before been questioned. For example, in the *amicus curiae* brief of the Association of American Railroads in *United Steelworkers of America* v. *NLRB,* No. 89, October Term, 1963, it was stated at page 6:

> ". . . railroads attempt to run their trains with supervisory personnel when regular crews, whose members belong to railroad labor organizations, refuse to cross picket lines."

This practice has been adverted to in many cases, illustrative of which are the following: *In Re Missouri Pacific,* 23 LRRM 2135, 2136 (E. D. Mo. 1948); *Lumber & Sawmill Workers Union,* 122 NLRB 1403, 43 LRRM 1324 (1959), *rev'd sub nom., Great Northern Ry. Co.* v. *NLRB,* 272 F. 2d 741 (9th Cir. 1959); *Missouri Pacific R.R.* v. *Brick & Clay Worker Board 602,* 238 S.W. 2d 945 (Ark. Sup. Ct. 1951).

Contrary to the astounding claim of the United States, the National Railroad Adjustment Board

Divisions (NRAB) have consistently held that agreements are *not* violated by the carrier's attempts to operate in any manner it sees fit during a strike. It is said (U.S. br. p. 42) that, ". . . numerous decision [sic] of the railroad adjustment boards . . . reflect the clear understanding that whenever strike operation is undertaken, it must conform with existing collective agreements."

The National Railroad Adjustment Board has consistently held that a carrier has a legal duty to perform its public service during a strike, and that the union agreements are not operative during the strike, and that a strike creates an emergency condition which justifies performance of the work in any manner found necessary. For example, the *Brotherhood of Railroad Trainmen and Kentucky and Indiana Terminal Railroad Company* case (NRAB, 1st Division, Award No. 17,055 (1955)) involved service by a railroad to a struck plant. The regular crews refused to cross the picket line to serve the struck plant and the company over an extended period, from September, 1949, through January, 1950, served the plant by using supervisors. Various claims were involved including a claim that supervisors performed switching outside of the strike area; that men on the extra board were not called and they were ready and available to perform the service; that a pilot was not used to accompany the supervisory crew; and that other men on the extra board were not called to fill positions of men who should have been called as pilots. All claims were denied. The Adjustment Board stated, in part, as follows:

> ". . . They [employees] base their claims on their contention that the company officials 'had no

seniority rights' and therefore acted 'in violation of the current agreement.'

* * *

"We agree that the officers did not have employee 'seniority rights', as those rights are defined and described in the agreement between the parties. But *it is the duty of the carrier to perform its public services and when its regular employees refuse to perform them, they cannot, reasonably, say the carrier violated their 'seniority rights' if it uses its officers to perform its services.*"

The *Brotherhood of Railway and Steamship Clerks, et al. and Macon, Dublin & Savannah Railroad Company* case (NRAB, 3d Division, Award No. 10,197 (1961)), relied upon by the United States, involved a strike called on the property of the carrier by the Brotherhood of Railroad Trainmen. The carrier abolished claimant's position of Chief Clerk in the Traffic Department during the period of the strike and work which he would have performed but for the strike was performed by supervisors or non-scope employees. Claimant asserted that the carrier violated the agreement. The Adjustment Board stated, in part, as follows:

". . . The Claimant's position was abolished and he was furloughed due to a Trainmen's strike during the period of this claim. The Board finds that due to the Trainmen's strike that *an emergency condition existed which justified the action by the Carrier during the period of claim.*"

The *Brotherhood of Maintenance of Way Employees and St. Louis Southwestern Railway Company* case (NRAB, 3d Division, Award No. 5042 (1950)), upon which the United States relies, involved a strike by the unions representing the carrier's engineers, fire-

men and switchmen. The Brotherhood of Maintenance of Way Employees filed a claim for pay which it alleged was due under its weekly guarantee for time lost when its members were laid off on account of a threatened strike by other railroad employees. The Adjustment Board stated in part that,

> "The record is clear that Carrier was faced with a complete termination of train operations at 6:00 A.M. on May 11, 1948, because of a threatened strike. Under such circumstances Carrier could properly abolish all positions remaining to protect itself from loss . . . .
>
> "The Organization contends that the act of the Carrier in abolishing the positions of claimants was in violation of the guarantee rule. This rule guarantees six days work of eight hours each per week during the existence of the employment relationship. It has no application to an employee whose work has been terminated by the abolishment of his assigned position."

The *Brotherhood of Maintenance of Way Employees and Missouri Pacific Railroad Company* case (NRAB, 3d Division, Award No. 5074 (1950)), cited by the United States involved a strike against the carrier by its trainmen, enginemen and yardmen and various claims by the Brotherhood of Maintenance of Way Employees protesting the Carrier's reduction of its non-operating forces by reason of a strike by its operating employees. The Adjustment Board denied the claim and stated in part that,

> ". . . here, as in all strike situations, we find the Carrier called upon to exercise its best managerial judgment in the face of a protracted and prolonged dispute with the operating personnel of its railroad. . . . That the Carrier had a

> right to reduce forces by abolishing positions . . . is no longer an open question in this forum. See Awards 4001, 3838, 3682, 4455 and 4787 above cited.
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> * * *
>
> "The latest pronouncements of this Board on the subject of applying 'guarantee' rules to strike situations are found in Awards 4099 and 5042, wherein it is held in effect that *'guarantee' rules are not enforceable during strikes.*
>
> "*We think it better to look upon these agreements for what they really are—rules governing wages, hours of service, and working conditions of employees as long as they remain in the service of the employer . . . .*"

Frankly we do not understand how the United States could have cited any of the foregoing NRAB cases as support of its position.[13] That the bargaining agreements are in effect suspended during a strike seems clear. This is the actual understanding of all carriers, rail and air, as well as the unions, and is consistent with the position of the NRAB. Whether the agreement is regarded as "suspended" or containing an implied exception for an "emergency condition" is purely a matter of semantics without effect on the carrier's right to operate. The repeated assertions by the United States and the present position of the Unions to the contrary understandably are not sup-

[13] The United States also cites in support of its position the case of *Brotherhood of Maintenance of Way Employees and Atlanta and West Point Railroad*, NRAB, Third Division, Award No. 4170 (1946), a case in which the NRAB denied the carrier's right to lay off maintenance-of-way employees during a strike by engineers and trainmen. The maintenance-of-way employees, unlike F.E.C.'s employees in the instant case, were neither on strike nor respecting picket lines, the carrier did not attempt to justify its action on any grounds related to the strike, and the case is entirely irrelevant.

ported by any of the authorities cited and as a matter of fact are flatly contradicted by many of the purported authorities.

Both the Unions and the United States contend that it is the carrier's duty to negotiate with the bargaining representatives over any change in operation during a strike; and that remaining or replacement employees are entitled to the benefits of the agreements (U.S. br. p. 27, *et seq.*, U. br. p. 32).

Nothing could be more absurd than bargaining over proposals to effectuate operation of the carrier during a strike with the very people who by their strike had tried to stop operations. We do not deny that, to the extent that negotiations with the unions representing the striking workers are requested by either party as to means for settling the strike, it is the duty of both sides to negotiate. But negotiations with the strikers over ways to operate during the strike would most certainly be an exercise in futility.

Similarly, the notion that F.E.C. was required to accord to replacements for the strikers all benefits of the agreements without deviation (U.S. br. p. 27, n. 20) is mistaken. The argument is not supported by the cases cited which *do not* (1) involve strike situations and (2) involve attempts by employers to undercut existing collective bargaining agreements by making permanent individual agreements with individual employees so as to supersede the collective agreements. That is not the situation here. The *Steele* and *Howard* cases (U.S. br. p. 27) have nothing to do with the question whether during a strike a carrier has to comply with agreements. There is no authority whatever for the contention; and, in the circumstances which faced F.E.C. at the time of the strike, to state the claim is to refute it.

III. THE ARGUMENT OF THE UNITED STATES AND THE UNIONS CONFUSES F.E.C.'S RIGHT OF SELF-HELP DURING A STRIKE WITH ITS RIGHT TO MAKE PERMANENT CHANGES IN AGREEMENTS

Both the United States and the Unons, in their initial briefs to the Court, are guilty of a most egregious error of fact and law in failing to distinguish between those changes necessitated by strike conditions and intended to endure only so long as the strike lasts, and those changes proposed to be made in collective bargaining agreements which are intended to exist regardless of the strike. The Railway Labor Act's procedures are applicable to the latter, not to the former. In their zeal to confuse this very real distinction, the United States and the Unions again resort to imprecise statements of fact and misinterpretations of the law, including citation of entirely irrelevant decision of the court. We take up first the facts, then the law.

Facts:

At the time of the strike, F.E.C. had no independent dispute with its operating employees and, except for two issues concerning wages and notice of job abolition, there was no other dispute with the non-ops. It is not the railroad which "broadened the area" of the original dispute by taking unilateral action but the Unions which converted a dispute of relatively small proportions into "a test of economic strength" by striking and honoring picket lines. The "wholesale changes" in working conditions referred to by the United States were brought about by the strike, a loss of the entire non-supervisory work force, and were not originated unilaterally by F.E.C. to prolong a dispute or to make changes it desired. Nor did F.E.C. make

changes in agreements or changes in "the rate of pay, rules, or working conditions of its employees, as a class, *as embodied in agreements . . .*" (45 U.S.C. § 152, Seventh). F.E.C. merely met the conditions which the strike created.

F.E.C. did not "abrogate" any agreements. It concedes that the strike provided no basis for attempting *permanent* changes in the agreements themselves. Some time after the strike began F.E.C. gave two Section 6 notices and did seek to place them into effect following a failure of the unions to negotiate concerning them. *This action was enjoined by the courts below and is not before this Court.* Before the Court now are only the temporary practices adopted to meet the strike, practices which in no way alter or change working conditions, rules, or rates of pay as contained in agreements.

The "Conditions of Employment" promulgated by F.E.C. in October of 1963, were a reduction to writing of certain of the Railway's temporary operating practices followed in direct response to the strike. Thereafter, F.E.C. also proposed amendments to existing agreements by serving a Section 6 notice embodying a set of working conditions denominated "The Uniform Working Agreement".[14] The similarity

[14] The United States and the Unions have seen fit to suggest (U.S. br. p. 6; U. br. pp. 17-18) that F.E.C. refused to negotiate over this notice by insisting on the presence of a reporter at negotiating sessions. (In the *Trainmen* case, *infra*, 336 F. 2d at 182, n. 28, the Court based its decision on other grounds and did not reach this question.) The record in the *Trainmen* case shows that the presence of a court reporter at such sessions was a practice accepted by the unions in previous conferences with F.E.C. over the same issues, and that the unions used the reporter's presence at the conferences in question to disguise an obvious refusal to bargain

between the temporary "Conditions of Employment" and the "Uniform Working Agreement" noted by the United States and the Unions is a fact devoid of juridical significance, for it does not convert temporary strike practices into unilaterally imposed permanent modifications of agreements which the Act forbids.

The United States and the Unions have only one reason for confusing the "Uniform Working Agreement" with the temporary conditions of employment resorted to by the Railway in attempting to operate during the strike, and that is to make it appear that the strike-induced practices were permanent changes forbidden by the Act. Of course this is fallacious. The operating practices represented by the "Conditions Of Employment" were and are terminable at the will of the non-ops, since they may at any time compel F.E.C. to revert to the collective bargaining agreements merely by calling off their strike.

The Law:

Does the Railway Labor Act forbid the carrier from making the sort of temporary adjustments to strike conditions represented by the "Conditions Of Employment"? This is a question which the United States and the Unions attempt to answer affirmatively

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over F.E.C.'s Section 6 notices (Joint Appendix Record in No. 691, O.T. 1964, pp. 29, 94-96, 125-26, 170). Concerning F.E.C.'s Section 6 notices embodying the "Uniform Working Agreement", the Presidential Emergency Board stated, "Of the various organizations receiving these notices, only the International Association of Railway Employees and the Brotherhood of Railroad Trainmen agreed to negotiate with the Company." (Ex. R. 459). The view of F.E.C.—that a party insisting upon the presence of a court reporter is not guilty of a refusal to bargain—has now been accepted by the Court of Appeals in *NLRB* v. *Southern Transport, Inc.*, — F. 2d —, 61 LRRM 2277 (8th Cir. 1966).

by reference to a host of court decisions having nothing at all to do with temporary, strike-induced changes in employment conditions. In this category are: *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32 (2nd Cir. 1964), *cert. denied*, 379 U.S. 817 (1964); *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192 (1944); *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957), *reh'g denied*, 353 U.S. 948 (1957); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952); *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944); *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944); *Railroad Yardmasters* v. *Pennsylvania R. Co.*, 224 F. 2d 226 (3d Cir. 1955); *Ry. Employees' Co-op Ass'n* v. *Atlanta B. & C. R. Co.*, 22 F. Supp. 510 (D. Ga. 1938); *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (2d Cir. 1962), *cert. denied, Brotherhood of Locomotive Engineers* v. *Rutland Railway Corp.*, 372 U.S. 954 (1963); *Order of Ry. Conductors* v. *Pitney*, 326 U.S. 561 (1946), *reh'g. denied*, 327 U. S. 814 (1946); *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711 (1945), *opinion on rehearing*, 327 U. S. 661 (1946); *Pullman Co.* v. *Order of Ry. Conductors and Brakemen*, 316 F. 2d 556 (7th Cir. 1963), *cert. denied*, 375 U.S. 820 (1963); *Butte, Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.*, 268 F. 2d 54 (9th Cir. 1959), *cert. denied*, 361 U.S. 864 (1959).

A second category of Railway Labor Act cases (four are cited—all airline cases) do involve strike situations, but each stands for a proposition totally at odds with that for which the case is cited. These are *Flight Engineers* v. *Eastern Air Lines*, 208 F. Supp. 182 (S.D.N.Y. 1962), *aff'd*, 307 F. 2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); *Pan American*

World Airways, Inc. v. *Flight Engineers' International Ass'n, PAA Chapter*, 306 F. 2d 840 (2d Cir. 1962); *Western Air Lines* v. *Flight Engineers Int'l Ass'n*, 194 F. Supp. 908 (S.D. Cal. 1961); and *Airlines Pilots Ass'n* v. *Southern Airways, Inc.*, 49 LRRM 3145 (M.D. Tenn. 1962).[15]

A third category of cases relied upon by the United States are National Labor Relations Act cases cited in a three-page footnote (U.S. br. pp. 38-41). They do not support the assertion that the NLRA cases are "wholly consistent" with the United States' position. See *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Indeed, they appear to support at least the "reasonably necessary" rule of the courts below for the United States' brief states that only "any unilateral action which is not *reasonably necessary* to maintain strike operations would be clearly unlawful" under the NLRA decisions. These cases clearly do not negate the right of self-help during a strike, and the policy of the NLRB consistently has been to recognize that strikes create conditions which warrant a different treatment of employees who work during the strike. Illustrative are the following decisions and rulings: *Mission Mfg. Co.*, 128 NLRB 275, 46 LRRM 1289 (1960); General Counsel Adm. Rulings Nos. SR-494, 46 LRRM 1253 (1960); SR-1170, 47 LRRM 1601 (1961).

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[15] The first three cases all involved the same dispute with the Flight Engineers, which the Union lost, and uphold rather than deny the right to try to operate during a strike. The fourth case likewise does not support the contention for which it is cited. The changes made were *permanent* and it is to this kind of a change *only* that the rule that the right of a party to effect changes may not be enlarged beyond those spelled out in the Section 6 opener applies.

Carefully ignored in the barrage of citations are the cases cited and quoted in F.E.C.'s brief which hold squarely that (1) self-help is available to a struck carrier and (2) the collective bargaining agreements are not in force against the carrier during a strike (see F.E.C. br. pp. 16-19, 25, 28-30). Also very carefully ignored, as we have observed before, is this Court's decision in the *B&O* case, *supra,* which clearly establishes the carrier's right of self-help once the Railway Labor Act's procedures are exhausted.

As has been set forth above (Point II) the right of a carrier to try to operate during a strike has never before been challenged. Unless clearly deprived by the statute of the right to operate, the right exists and should not be tampered with.

With a responsibility for moving traffic in aid of the nation's needs, rail and air carriers should not be restricted in making an attempt to operate in an emergency which a strike brings about. The position of the United States and the Unions and of the courts below means necessarily that regardless of the common good, and in spite of a national emergency a rail or air carrier could not, in the face of a strike which deprived it of its union employees, try to operate during an emergency unless full compliance with bargaining agreements was maintained. The Railway Labor Act could not have intended such a result.

IV. THE UNITED STATES EFFECTIVELY CONCEDES THAT THE PROPER FORUM FOR ADJUDICATION OF SUITS TO ENFORCE OR APPLY COLLECTIVE BARGAINING AGREEMENTS DURING STRIKES IS NOT THE FEDERAL COURTS BUT THE NRAB.

After taking a contrary position for forty-eight pages, in an astounding about face, the United States makes the following statement (U.S. br. 48-49):

> "(3) *Even where collective bargaining agreements make no explicit provision for a strike situation, it may be open to a carrier to urge that limited departures from the literal terms of its agreements are permissible under a fair reading of these agreements.* Without in any sense departing from the agreements, relief[16] may thus be obtained under appropriate doctrines of contract interpretation applicable to abnormal conditions . . . .
>
> "Indeed, at least some of FEC's unions have shown a willingness to respect such conditions of impossibility. In the *Trainmen's* case, 336 F.2d 172, it appears that the union conceded that its agreement with FEC did not completely preclude the use of supervisory personnel in some positions when other replacements were, in fact unavailable. *Similarly, the government has never suggested that FEC would be totally foreclosed from making all changes in working rules or conditions during a strike, should such changes be asserted as proper under a fair reading of the contract* . . . . Should disagreement arise over the application of contract terms where such contentions are made by the carrier under the contract and rejected by the union, the Act provides a clear basis for an arbitrated settlement through invocation of the 'minor' disputes procedure by the appropriate division of the National Railroad Adjustment Board."

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[16] It is assumed that the "relief" obtainable would be in the guise of the denial of an award to a claimant before the NRAB.

This passage, which is consistent with an earlier reference to the "adjustment boards" as "the primary statutory agency for interpreting the effect of collective agreements" (U.S. br. p. 40), is a most significant concession. The error which the United States makes in passing is the assertion that, "Such a contention that its changes were proper under the contract was not made by F.E.C." *This is not true.* The Railway maintained both in the District Court and in the Court below that the contracts were suspended during the strike, but if they were not suspended the temporary operating practices adopted in response to the strike were contractually justified, and for this reason it has continually urged that jurisdiction over the subject matter of the United States' action was not in the courts below, but in the NRAB (R. 106, 108, 116-19, 570-71).

Clearly, as the statements of the United States imply, immediately upon finding that the agreements remained in active force during the strike period, the District Court exhausted whatever jurisdiction it may have had, and was without power either to issue an injunction enforcing the agreements or to decide what portions of those agreements were to be unenforceable on grounds of "reasonable necessity." The doctrine of "reasonable necessity" is no more than the principle of impossibility of performance dressed up. And, it is the NRAB alone which had jurisdiction to decide, as a matter of contract interpretation, which contract provisions, if any, should be enforceable during the strike.

In its initial brief (pp. 37-39), F.E.C. listed a number of matters taken up in District Court which it contends were pure questions of contract interpretation and application. The United States' statements

above not only concede this point, but appear to go even further. The United States claims that what a carrier may or may not do during the period of a strike may be considered as a matter of contract law. It states that, even in the absence of specific provisions in agreements relating to a carrier's strike operations, "it is most likely that existing agreements . . . do, in fact, incorporate a mutual understanding . . ." (U.S. br. at 47-48). That "understanding", it maintains, based on its view of the industry practice, is that "strike operation will not be attempted contrary to the terms of these agreements." As already demonstrated *supra*, Point II, there is indeed an industry practice, which has been regarded as a contractual "understanding", but it is exactly contrary to that asserted by the United States. Whatever be the understanding, the NRAB[17] and not the District Court, was the proper body in which to seek an interpretation and application of it. The courts below clearly lacked jurisdiction to enforce existing agreements in whole or in part. They most certainly circumvented the NRAB improperly by adjudicating day to day contract disputes during the strike.

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[17] The case of *Western Air Lines* v. *Flight Engineers Int'l Ass'n*, *supra*, erroneously cited by the United States in support of a different proposition, squarely supports the jurisdiction of the NRAB to determine disputes concerning the applicability of agreements during strikes. See, also, *Flight Engineers Int'l Ass'n* v. *Western Air Lines*, 48 LRRM 2487 (S.D. Cal. 1961).

V. ADDITIONAL ERRORS OF FACT AND LAW BY THE UNITED STATES AND THE UNIONS FURTHER WEAKEN THEIR POSITION.

A. The Toledo Case[18] Is Misapplied by the Unions

The Unions devote one point of their initial brief (U. br. pp. 47-49) to the contention that the *Toledo* case, refusing to grant an injunction sought by a railroad which had declined arbitration prior to a strike, applies herein so as to deny F.E.C. the right to apply to the District Court for approval of "reasonably necessary" employment practices during the strike period. This contention is so clearly erroneous that even the United States, which cites the *Toledo* case in support of another proposition (U.S. br. pp. 45-46), refuses to advance it.

In the first place, the facts of the *Toledo* case have nothing to do with those of the instant case. There, during a state of national emergency, the unions postponed their strike and agreed to arbitration. The carrier's refusal to arbitrate precipitated the strike. Here, although F.E.C. did not reject arbitration, but requested further mediation, the unions flatly rejected further mediation or arbitration prior to the strike.[19] Instead they attempted for several months to compel the Railway to cease operations, and agreed to arbitration only after the Railway had restored operations during the strike period. The F.E.C. was clearly under no duty of any sort, legal or moral, to arbitrate at

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[18] *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944).

[19] The letters of F.E.C., the Unions and the NMB on the subject are printed in Appendix A hereto. The assertion that initially, both parties rejected arbitration is based upon an erroneous understanding of a statement in the Emergency Board Report.

that point. The assertion of the United States (U.S. br. p. 46) that agreement of F.E.C. to arbitrate after the strike had commenced would have required "immediate cessation of the strike" is wrong and is based on the erroneous assumption that such an agreement would necessarily return the parties to their pre-strike positions.

Furthermore, the *Toledo* case is entirely inapposite since there, the carrier, having brought on the strike by refusing arbitration, sought the aid of a court in equity; whereas, here, the Unions declined arbitration and chose to strike. Under the doctrine of the Court below in the instant case and in the *Trainmen* case, a carrier has a *legal* right to resort to self-help, and applications for approval of "reasonably necessary" employment practices are merely one means of vindicating this legal right. They are not in any sense requests for equitable relief. The irrelevance of the *Toledo* case to the instant litigation is beyond dispute.[20]

B. F.E.C. Does Not Contend That the Railway Labor Act Is "Suspended" During a Strike, Nor Does It Seek To Establish Any "Exception" to the Act

In numerous instances both the United States and the Unions unfairly characterize F.E.C.'s position as claiming that the statute is "suspended" during strikes, or that the operations of a strike-bound carrier represent an "exception" to the Act (U.S. br. pp. 25, 26, 31, 33-34, 38, 39, 51; U. br. pp. 30, 32, 33, 43, 44, 45, 47-49). Thus, the Unions argue at length that F.E.C. has taken the position that the Railway Labor Act is

[20] An additional irrelevancy introduced by the Unions in this case is their reference to picketing enjoined by the federal courts in 1963, in cases entirely unrelated to this one (U. br. pp. 21-24). These cases, which are not before the Court, are cited for the first time in this litigation and are clearly irrelevant.

entirely suspended during a strike, that the Act is "inapplicable" and "no longer limits the conduct of the parties" (U. br. pp. 40-41). These characterizations of F.E.C.'s views are straw men, set up in order to give F.E.C.'s opposition something to knock down. They entirely misrepresent the Railway's position.

The right of a carrier to operate during a strike in temporary disregard of collective bargaining agreements connotes neither a suspension of the Act nor an exception thereto. Absent the statute, the right of self-help clearly exists; and the burden is thus on F.E.C.'s opposition to show that this conduct which is *prima facie* lawful is rendered unlawful by the statute. This burden is not carried by the United States and the Unions. They are unable to show that either the intention of the statute, industry practice, prior decisions of federal courts and responsible agencies, or the philosophy of collective bargaining in the United States outlaws the temporary, strike-induced operating practices at issue. The suggestion that F.E.C. believes the provisions of the Act relating to proposed permanent changes in agreements to be "suspended", or claims an "exception" therefrom, is incorrect. As concerns such changes, the Railway believes that the Act continues to be applicable all during the period of a strike. Temporary practices adopted in response to a strike, however, were not intended to be restricted, and are not outlawed by the Railway Labor Act.[21]

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[21] The United States attempts to justify its standing to challenge the temporary practices adopted by the Railway on grounds other than those relied on by the Court below (U.S. br. pp. 51-55). F.E.C. remains unconvinced that the United States has standing to intervene in private labor disputes in the absence of actual interference with or obstruction to interstate commerce: see *United States* v. *United Mineworkers of America*, 330 U.S. 258 (1947).

CONCLUSION

It is respectfully submitted that the decision of the Court below should be reversed and that the injunctions issued against the F.E.C. in the courts below should be vacated.

Respectfully submitted,

WILLIAM B. DEVANEY

GEORGE B. MICKUM, III

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Washington, D. C. 20036
Counsel for Petitioner

Of Counsel:

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1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

April 9, 1966

APPENDIX

APPENDIX

APPENDIX A

FLORIDA EAST COAST RAILWAY COMPANY

St. Augustine, Florida,
September 28, 1962.
2

Mr. E. C. Thompson, Executive Secretary,
National Mediation Board,
Washington, D. C.

Dear Sir:

This will acknowledge receipt of your letter of September 25, 1962, concerning Case No. A-6627 Sub. No. 1, proffering arbitration in the dispute described by you as follows:

> "Employes notice dated 9-1-61 requesting 25¢ per hour increase in rates of pay and 6 months advance notice to discontinue positions, also carrier's counter proposals as served by the various carriers on organizations involved on or about 9-18-61 proposing changes in rates of pay for certain employees and various rules changes."

It is my position that the proffer of arbitration in this dispute is premature and that further mediation in the case might bring about an amicable settlement. Therefore, I suggest that the matter be re-docketed for discussion on the property.

Yours very truly,

/s/ R. W. WYCKOFF
Assistant Vice President and
Director of Personnel.

RWW-h
bc: Mr. W. L. Thornton (Personal).
As information.

THE ORDER OF RAILROAD TELEGRAPHERS
3860 LINDELL BOULEVARD
ST. LOUIS 8, MISSOURI

G. E. Leighty,
President

Telephone
JEfferson 3-8321

October 19, 1962

Mr. E. C. Thompson, Exec. Secretary
National Mediation Board
Washington 25, D. C.

Subject: Case No. A-6627
Sub No. 1
Florida East Coast Railway

Dear Sir:

Under date of October 10, 1961, the Eleven Cooperating Railway Labor Organizations, by its duly authorized representative, made application in due form and in accordance with the provisions of the Railway Labor Act for the services of the National Mediation Board in the following dispute:

> "Employes notice dated 9-1-61 requesting 25¢ per hour increase in rates of pay and 6 months advance notice to discontinue positions, also carriers' counter proposals as served by the various carriers on organizations involved on or about 9-18-61 proposing changes in rates of pay for certain employees and various rules changes."

Mediator James M. Holaren conducted mediation proceedings in connection with this dispute on two occasions without composing the differences. Under date of September 25, 1962, you addressed a joint letter to Mr. R. W. Wyckoff, Assistant Vice President and Director of Personnel of the Florida East Coast Railway Company and the undersigned, requesting and urging that we enter into

an agreement to submit the controversy to arbitration as provided in Section 8 of the Railway Labor Act.

Under date of September 28, 1962, Mr. Wyckoff addressed a letter to you in which he took the position that the proffer of arbitration in this dispute is premature and that further mediation in the case might bring about an amicable settlement and suggested that the matter be redocketed for discussion on the property. Knowing the situation as I do, I cannot agree that the suggestion made my Mr. Wyckoff would be helpful.

This identical dispute was before Emergency Board No. 145 which made its report and recommendations and the Carrier's Conference Committees and the Eleven Cooperating Railway Labor Organizations entered into an Agreement disposing of this dispute on June 5, 1962. No good purpose would be served in arbitrating this identical dispute on the Florida East Coast Railway and we, therefore, must decline to arbitrate.

Very truly yours,

G. E. LEIGHTY
Chairman
Eleven Cooperating
Railway Labor
Organizations

NATIONAL MEDIATION BOARD

WASHINGTON

October 22, 1962
Case No. A-6627
Sub No. 1

Mr. R. W. Wyckoff
Assistant Vice President & Director of Personnel
Florida East Coast Railway Company
St. Augustine, Florida

Mr. G. E. Leighty, Chairman
Eleven Cooperating Railway Labor Organizations
c/o The Order of Railroad Telegraphers
3860 Lindell Boulevard
St. Louis 8, Missouri

Gentlemen:

We have been advised by Mr. Leighty, Chairman, Eleven Cooperating Railway Labor Organization, in answer to our letter addressed jointly to your respective carrier and organization, under date of September 25, 1962, that the organization has declined, in writing, to arbitrate the question in our Case No. A-6627, Sub No. 1.

Your attention is therefore directed to the last clause in Section 5, First (b) of the Railway Labor Act, as amended, reading as follows:

> "If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

It is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement.

In these circumstances, notice is hereby served in behalf of the Board that its services (except as provided in Section 5, Third, and in Section 10 of the law) have this day been terminated under the provisions of the Railway Labor Act.

We are sending to Mr. Wyckoff a copy of Mr. Leighty's letter dated October 19, 1962.

By order of the NATIONAL MEDIATION BOARD.

Very truly yours,

E. C. THOMPSON
E. C. Thompson
Executive Secretary